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Research Monograph
On
"ADR Mechanisms in Bangladesh Widening Scopes for Access to Justice"

Research Paper submitted in partial fulfillment of the requirements of the degree of LL.M (1 year) under Sonargaon University

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Subject: Submission of Research Monograph on "ADR Mechanisms in Bangladesh Widening Scopes for Access to Justice"

Sir,

It is a great pleasure for me to submit the research monograph on the topic of **"ADR Mechanisms in Bangladesh Widening Scopes for Access to Justice"** While researching I tried my best to make this research monograph to enough standard. I hope that this paper will fulfill your expectation.

I therefore, hope that you be kind enough to go through this paper for evaluation.

Yours sincerely,

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DECLARATION

I hereby do solemnly declare that the work presented on this thesis report has been carried out by myself and has not previously submitted to any other institution. I have presented the work, does not infringe any copyright.

I further had borne to indemnify the University against any loss or damage arising from infringement of the foregoing obligations.

The views and opinions expressed in this research are absolutely mine except those

Which I have quoted. I do not claim that my views are correct from every point of view. There may be shortcomings and wrongs and only I am responsible for those.

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SUPERVISOR CERTIFICATION

This is to certify that the thesis on **"ADR Mechanisms in Bangladesh Widening Scopes for Access to Justice"** has been conducted by **Farzana Sultana, LLM2301028019** in partial fulfillment of the requirements for the Degree of LL.M. (Masters) from Sonargaon University (SU). The thesis has been conducted under my benevolent guidance and supervision and is recorded as a bona fide work carried out successfully

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AKNOWLEDGEMENT

All praises be to ALLAH (SWT) who sustained my life in good health and sound mind throughout my entire study period in this country.

Without ALLAH (SWT)'s grace and mercy this piece of work would not have seen the light of the day. "ALHAMDULILLAH.

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ABSTRACT

The rule of law and access to justice are essential to the growth and stability of a state. Because alternative dispute resolution (ADR) is a tried-and-true method of ensuring that everyone can access justice in a civilized manner without resorting to adversarial hearings in formal litigation, ADR programs are becoming more and more significant in almost every jurisdiction. Bangladesh is a prominent participant in these commendable initiatives. The societal perception and functioning of courts have been impacted by the movements for access to justice and alternative dispute resolution. Both movements have criticized the courts for their failure to provide accurate, significant, and accessible justice for the populace. ADR has also been highlighted as a tool for better dispute resolution procedures that lead to better results. In order to fully realize the potential of alternative dispute resolution (ADR) as a tool for granting access to justice, this paper seeks to identify the necessity of ADR and various forms of dispute resolution mechanisms, as well as the necessity of dispute resolution system design. This is an attempt to present a thorough understanding of the methods by which our legal system allows people to access justice. It does this by examining the theory and practice of access to justice, as well as the court and non-court based applications of those modalities under various laws in Bangladesh. This demonstrates the efficacy, efficiency, and fairness of alternative dispute resolution (ADR) in advancing access to justice. Lastly, it talks about how Bangladesh has implemented reforms in alternative dispute resolution (ADR), which are a well-liked aspect of justice access.

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List of Abbreviations

AC	Appeal Courts
AD	Appellate Division
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
ADR	Alternative Dispute Resolutions
CPC	Code of Civil Procedure
AIA	Association for International Arbitration
NGO	Non-Governmental Organization

Chapter: 1

INTRODUCTION

1. Introduction

Everyone has right to access formal state justice. Equal access to justice is one of our most basic rights. However, many people are denied or cannot access the formal system on an equal level with others for some reasons. Dispute resolution is a process that implies the causes of conflict as well as the resolution of such conflicts. Conflict is a regular and continuous process in our day-lo-day life. Conflict can be resolved or settled, but once resolved, new conflicts may arise. It is also a continuous process one is resolved and another one emerges. Conflict cannot be eliminated forever from our lives, but it can be minimized. Conflict on its practical mom means, a conflict may not become a dispute if it is not communicated to someone in the form of perceived incompatibility or a contested claim. Law is more than norms it is reflection of the aspiration through which a notion passes. With the changing needs of society its legal system, changes. If it is does not slowly becomes a dead and unless system. Mediation, negotiation and conciliation in the Family courts are recommended on a careful problems, there causes and potential solution under the Alternative Dispute Resolution of the Family Matters. In Bangladesh several Non-Government organization c.g. Madaripur legal Aid Association, Action Aid, BLAST, Ain Salish Kendro, Assistant Slum Dwellers and Family Court of Bangladesh bring a relief of the parties. But unlike mediation, negotiation a conciliation in the out side of the court or in the Family Courts the disputes by Salish do not deny in force behind them and as such binding upon either party. Therefore Salish remain dormant and

can be revived at any time where as mediation, negotiation and conciliation of the Alternative Dispute Resolution in the Family Matters.[1]

1.2 Objective of the Study:

Objectives of the study all types of Courts in Bangladesh are burdened with litigants. These problems have been arisen due to the defects of adversarial system .

- The main objective of this study to analyze the significant role of Lawyer in ADR System and also to recognize the concept of ADR in Bangladesh in procedural law for criminal matters.
- This essay also focuses on the Mechanism of ADR System.
- To know about of ADR Mechanisms in Bangladesh Widening Scopes for Access to Justice

1.3 Methodology of the Study:

Methodology of the study this is a socio-legal research. This essay is Descriptive and suggestive in nature. This study is based on both primary and secondary data collected from law reports, text books, journals, Newspaper, websites, and training workshops on ADR. The collected data have been processed and prepared in the present form in order to make the study more informative, analytical and useful for the users.

1.4 Literature Review

A couple papers responding to this question suggest that reports should be used by the neutral who worked on a case to help him/her improve their practice (EPA

[1] Md. Abdul Halim ADR in Bangladesh Issues and Challenges 2nd ed.(CCB Foundation Dhaka, 2011)

2008, Church 2002, Rolph 1995)[2], or that Funders may want to see a broad array of projects evaluated with aggregated1 results to ensure that money is well spent (Church 2002). The evaluation could also look at the relationship between expected outcome and case indices and statistics (time of process, number of participants, hours spent at meetings, etc) (Orr 2008), and thus tell us what sort of track we are on. Larger empirical studies have been used to either prove or disprove the value created by ADR projects, frequently to defend or attack the efforts of the work itself. Lastly, evaluations are often used to justify the existence of a program to a body of authorizers. Essentially, evaluation asks 'is it working' and 'what do we need to do to improve it'.

For environmental conflict resolution (ECR), Frank Dukes (2004) suggests that perhaps the most compelling question evaluation asks is how ECR compares to other ways of addressing [environmental] conflicts.[3] This question applies to a spectrum of ADR projects broader than environmental. Analysts of ECR, proponents and critics alike, commonly think of it as an alternative to other, more traditional, processes. Traditional procedures primarily include legislation, administrative decision making (agency rules and regulations), and adjudication. The risk in thinking of ECR [and ADR] as only an alternative to 'Traditional procedures' is that we fail to appreciate that ECR processes are less often alternatives and more often one part of a complex and interdependent system of legal, legislative, or administrative processes (Dukes, 2004).[4]

[2] Florsheim, J. L., Mount, J. F., & Chin, A. (2008). Bank erosion as a desirable attribute of rivers. *BioScience*, *58*(6), 519-529.
[3] Dukes, F. (2004). From enemies, to higher ground, to allies: the unlikely partnership between the tobacco farm and public health communities in the United States. *Participatory governance: planning, conflict mediation and public decision-making in civil society*, 165-187.
[4] Luo, Y., Su, B. O., Currie, W. S., Dukes, J. S., Finzi, A., Hartwig, U., ... & Field, C. B. (2004). Progressive nitrogen limitation of ecosystem responses to rising atmospheric carbon dioxide. *Bioscience*, *54*(8), 731-739.

Conley and Moot (2003) echo many of these feelings while saying that motivations for evaluations vary. Participants may want evaluations to help them improve their efforts, facilitators may want to improve their practice and identify what sort of project processes are best for different types of conflict scenarios, policy makers may want evaluation feedback to help create regulations, authorizing bodies desire proof of the value of ADR processes, legislative or agency mandates may have performance measurement requirements, while funders may want to be assured that their money is well spent. Early evaluations of environmental mediation, for example, focused on measures addressing cost, time, fairness, innovation, and longevity of agreement. Further considerations for evaluation include critics wanting to demonstrate the legitimacy of their concerns and academics may use evaluation results to help explore all of the above (Conley and Moot 2003).[5]

However, program effectiveness can tell us how a program design and administration can be improved (Sharf, 2004).[6] In general, measures of success have a stronger chance of holding ground if they are focused on what value is created by the ADR process. We should keep in mind that a public policy ADR project is often one segment in a larger process, so identifying the 'when' in the project that success should be captured ignores the long term cycle of policy conflict and resolution. Lastly, the conflict surrounding the definition of success should not suggest the absence of success, but instead bring to light that there are varieties of success.

[5] Conley, J. M., & Makowski, R. (2003). Back to the Future: Rethinking the Product of Nature Doctrine as a Barrier to Biotechnology Patents (Part I). *J. Pat. & Trademark Off. Soc'y*, *85*, 301.

[6] Sharf, A., Alexa, M., & Cohen-Or, D. (2004). Context-based surface completion. In *ACM SIGGRAPH 2004 Papers* (pp. 878-887).

1.5 Limitation of the Study

Research is a challenging endeavor that requires expertise and knowledge. Despite my strong drive, there are some obstacles and limits that prevent me from performing to my full potential. Major ones are follows: I complete my research paper in very short time that's why I cannot use all materials which I wanted. If I used all materials that would be better. I think short time is a limitation of this study. The study has conducted within specific subject is ADR mechanisms in Bangladesh widening scopes for access to justice; The duration of the study is very short, more in depth investigation would have resulted better outputs;

Chapter 2

HISTORY OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

2.1 Definition

Alternative dispute resolution (ADR) (also known as external dispute resolution in some countries, such as Australia) includes dispute resolution processes and techniques that act as means for disagreeing parties to come to an agreement short of litigation. Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation; attendance that is not settlement at mediation). The rising popularity of ADR can be explained by the increasing! caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior Judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favor of the use of mediation to settle-disputes.

“Alternative dispute resolution” (ADR) is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a way that is less formal and often more consensual than is done in the courts. While the most common forms of ADR are mediation and arbitration, there are many other forms judicial settlement conferences, fact-finding, ombudsmen, special masters, etc

Though often voluntary. ADR is sometimes mandated by the courts, which require that disputants try mediation before they take their case to court.[7]

2.2 Scope of ADR

ADR mechanisms have been extensive used in civil matters. But in a short it is now being in the administration of criminal justice system also which is further extended to the sphere of Juvenile justice system. In our country in The Code of Criminal Procedure, 1898 have inserted some provision as Section 345 and sehedule-2 of the Code of regards to the compromising offence of the Penal Code. The application of ADR and area are spearing day by day over the globe.[8] Generally ADR applied in civil, commercial, industrial, familial, contract, insurance, partnership business, real estate etc. But it is considered as a best way of solving regards to the international commercial disputes. ADR successfully access and peacefully try to solve the dower, maintenance, divorce, restitution of conjugal life, guardianship, succession and on the familial matter which are getting mental depression of common people of the society. It is extended to differences in values and beliefs between communities, personal interests love and domination over one another power struggle contest between candidates or parties to win election, mistrust suspicion of one another, injustice exploitation by economic and other means, denial of right to resources, religious practice, political campaign etc.[9]

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[7] Md Abdul Halim ADR in Bangladesh Issues and Challenges 2nd ed.(CCB Foundation Dhaka, 2011)

[8] Md. Abdul Halim, *ADR in Bangladesh: Issues and Challenges*, 2nd ed. (Dhaka: CCB Foundation, January, 2011), p. 25.

[9] Dr. Nusrat Ameen, Dispending Justice to the Poor: The Village Court, Arbitration Council Via-a vis NGO Mediation, *Dhaka University Studies*, Part-F, Volume XVI, Dhaka (2005), p. 19.

2.3 History of ADR

Although mediation goes back hundreds of years, alternative dispute resolution has grown rapidly in the United States since the political and civil conflicts of the 1960. The introduction of new laws protecting individual rights, as well as less tolerance for discrimination and injustice, led more people to file lawsuits in order to settle conflicts For example, the Civil Rights Act of 1964 outlawed discrimination in employment or public accommodations on the basis of race, sex, or national origin. Laws such as this gave people new grounds for seeking compensation for ill treatment. At the same time, the women's movement and the environmental movements were growing as well leading to another host of court cases. The result of all these changes was a significant increase in the number of lawsuits being filed in U.S. courts. Eventually the system became overloaded with cases, resulting in long delays and sometimes procedural errors. Process like mediation and arbitration soon became popular ways to deal with a variety of conflicts, because they helped relieve pressure on the overburdened court system.[10]

Dispute resolution outside of courts is not new, societies world-over have long used non judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes. The ADR movement in the United States was launched in the 1970, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as legal movement to address increased delay and expense in litigation arising from an overcrowded court system. Ever since the legal ADR movement in the United States has grown rapidly and has evolved **fruni** experimentation to in 3titutionalization with the

[10] Prof. Dr. Anwar Ali Khan. An introduction to ADR, Hira Publications,2nd ed, 2010.P.4)

support of the American Bar Association, academics, courts, the U.S. Congress and state governments

For example, in response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models expansion of government-mandated, court-based ADR in state and federal systems and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR.

2.4 History of Development of ADR

This sub-continent:

(1) In India the origin of ADR could be traced to the origin of political institutions on the one hand and trade and commerce on the other hand. It is observed from the historical document that ADR in the name of dispute resolution institutions prevalent during the ancient period. was reported that resolution of disputes between members of a particular clan or acceptor or between members of a particular locality, by kolas assembly of the members of a clan, sirens guild of a particular occupation and pug as (neighborhood assemblies). In rural India panchayat (assembly of elders and respected inhabitants of village decided almost all disputed between the inhabitants of the village, which disputes between the members of a clan continued to be decided by the elders of the clan.[11]

One of the main characteristic of the traditional institutions is that they were recognized system of administration of justice and not merely alternatives to the formal justice system establish had by the sovereign the

[11] Prof. Dr. Anwar Ali Khan, An Introduction to Alternative Dispute Resolution (Dhaka: Hira Publications, 2nd ed 2010.pg.4)

feudal lords kais, the adalat system introduced by of the the ruling group and the existing court system. The two systems continued to operate parallels to each other.

It is pertinent to say that the procedure and the nature of preceding these institutions were very much similar to the ADR. This was also applicable to this country as because it was the part of the India.

(2) The formal system of administration of justice introduced during the British rule replaced the old system of dispensing justice through feudal set-up. But the traditional institutions continue to play their role of dispute resolution thou not known by their old name. As because we still have disputes between members of a clan.

(3) After math, arbitration and conciliation as the methods of ADR ,received statutory recognition in the code of civil procedure code, 1908 (section 89, arbitration and order XXXII A rule 3, conciliation).

(4) Having passed the Arbitration Act, 1940, arbitration provision was repeated from the CPC But it is pertinent to say that the application of the provisions this Act was not satisfied ant the courts would not follow these provisions mandatory.

(5) During the Pakistan period, arbitration as one of the important method of ADR received statutory recognition in the Muslim family ordinance, 1961. Under this ordinance, to arbitration, as a method of ADR is mandatory to resolve the dispute as to dissolution of marriage. Union perished would have to follow arbitration process to resolve this dispute.

(6) Having followed the above mentioned ordinance the family court ordinance was promulgated in 1985 and as a result some family courts have been established in different places of Bangladesh.[12]

[12] The Prof. Dr. Anwar All Khan, Action to Alternative Dispute Resolution (ADA).2nd ed. hira Publication, 2010.p.9-10

The Indian suit (Food of Corporation of India v. Toginder Pal Mohinder Pal) The Indian Supreme court observed that, "ADR is seen as a part of a package system designed to meet the needs of consumers of justice.[13]

The Indian supreme court another says that we should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done".

2.5 The Association for International Arbitration

The Association for International Arbitration (AIA) is a non-profit organization, founded in Paris in 2001 by Johan Bililet. The Association for International Arbitration has an increasing number of members among arbitrators and mediators of international backgrounds.

The Association was established with the aim of facilitating arbitration, mediation and general forms of dispute resolution internationally. Today, the AIA has developed into organization dealing in the private international law field to meet the needs of the fast growing evolution of dispute resolution within the international community. ATA provides information, training and educational activities to expand the promotion of arbitration and ADR globally by means of securing partnerships with various organizations and parties to get involved in the life of the association. The association constantly works to develop partnerships in the international realm and to provide the international community of arbitrators and ADR professionals with continuous exposure to the latest international

[13] Md. Akhtaruzzaman. Concept and laws on Alternate Dispute Resolution and Legal Aid,7 th ed. (Razia khatun,2018p.104)

developments, activities and opportunities in the field. All continually encourages the participation and contribution of its members in the pursuit of the association's goals.[14]

2.6 Purports of Alternative Dispute Resolution (ADR)

Instrumental facet of ADR spells out that the parties can reach to a harmonious settlement of the dispute which is opposed to the win-lose outcome of the legalistic and formalistic approach of litigation.[15]These methods are an informal, non-binding, confidential and non-adversarial manner on the basis of mutual cooperation and understanding of all concerned. ADR is usually considered to be alternative to litigation. The phrase Alternative Dispute Resolution (ADR) refers to all those decisionmaking processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.[16] It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to disagreement or violence.

Actually, ADR is a process of resolving disputes outside the ordinary judicial process. So, it is informal methods of settling disputes other than by court actions. It also includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation outside the court. Its means and methods are voluntary and not compulsory. Consequently, this dispute resolution system is getting increased momentum for early and consensual disposal of litigations. Evidently, apart from courts' initiatives, the process of ADR is mainly regulated by the nongovernmental organizations (NGOs). So, the

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[14] Pro Dr. Anwar Ali Khan introduction to Alternative Dispute Resolution (Dhaka: Hira Publications, 2nd ed,2010.pg.10)

[15] For an excellent materials, see Justice Iyer, Krishna,V.R: Law, lawyers and justice, B.R. Publishing Corporation Delhi.

[16] Basing on its misnomer premise, it can be argued that some conflict management mechanisms are claimed to be resolution mechanisms while others are settlement mechanisms. It is, however, collectively referred to as alternative dispute resolutionor ADR.

role of NGOs in implementing ADR mechanism in Bangladesh is to be marked. Optimistically, it is worth mentioning that despite historic resistance to ADR by some quarters and their advocates, ADR has gained widespread acceptance among both the general public and the legal professionals in recent years.

2.7 Approaches of Alternative Dispute Resolution (ADR)

As stated earlier, ADR is a name given to the process where parties in a dispute come to a compromise (or settle their dispute) without going to court and there are divergent forms of ADR mechanism. *Mediation* is where a neutral person who acts as a facilitator (the mediator) helps the parties to reach a compromise. The mediator doesn't offer an opinion. Mediation is most suitable where there is some chance that the parties themselves will co-operate. *Conciliation* is similar to mediation. However, the conciliator plays a more active role in the process. *Arbitration* is the most formal of the methods used to settle disputes without using the courts. *Negotiation* is the simplest form of ADR. *Med-Arb,*as its name suggests, combines mediation and arbitration. *Minitrial* is finding its greatest use in resolving large-scale disputes involving complex questions of mixed law and fact, such as Product Liability, massive construction, and antitrust cases. A *settlement conference* is a meeting between opposing sides of a lawsuit at which the parties attempt to reach a mutually agreeable resolution of their dispute without having to proceed to a trial. *Case evaluation* refers to presenting the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator. *Neutral fact-finding* is a process where a neutral third party investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes. Other form of ADR, inter alia, includes Early

Neutral Evaluation, Expert Determination: Family group conference etc. Although these are not institutionalized throughout the globe, but both the community members and the disputants accept it. It is submitted that particularly concerns illiterate and/or poor population who cannot afford to navigate conventional legal channels.[17]

2.8 Recompenses of Alternative Dispute Resolution

As underscored earlier, the disputing parties through ADR can reach to a harmonious settlement of the dispute which is opposed to the win-lose outcome of the legalistic and formalistic approach of litigation. These methods are an informal, non-binding, confidential and non-adversarial manner on the basis of mutual cooperation and understanding of all concerned. Settling a dispute using ADR is usually much quicker than using the court system. A specialist from within a particular trade or industry is able to suggest a reasonable solution which will be acceptable to the parties involved. A judge is unlikely to have specialist knowledge, other than in the law.ADR is conducted in private, therefore avoiding publicity from the media. The aim of ADR is to find a compromise solution which is acceptable to both parties. Court proceedings create a winner and a loser. Using ADR to settle a dispute means businesses can remain on good terms and continue to trade with each other once their dispute is resolved. Besides, all forms of ADR are far cheaper than taking a case to court. Every case solved through ADR saves the Government money and stops the courts being over burdened with cases. It is true that ADR system plays an important role in speedy disposal of dispute but there are some limitations of this system too. Unequal bargaining powers a hindrance to reap it's desired benefits. In certain cases, one side is able to dominate the other, *i.e*. employment and divorce cases that make Courts a

[17] Trina Grillo, the Mediation Alternative: Process Dangers for Women, 100 Yale Law.J. (1991). Available at: http://digitalcommons.law.yale.edu/ylj/vol100/iss6/1 Accessed 28 Nov 2023

better option for the weak. Where a dispute involves difficult legal points, a mediator or arbitrator is unlikely to have the same legal expertise and knowledge as a judge. Besides, it isn't easy to predict the outcome of a dispute decided through ADR as there is no system of precedent. So, uniform verdicts even on similar cases may not be given. Moreover, decisions of ADR are not legally binding, making any award difficult to enforce. Unpleasantly, if using ADR fails to resolve the parties' dispute, court action may still be needed. This adds to the costs and delays compared to taking a dispute directto the courts in the first place.

Chapter 3

MECHANISMS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN BANGLADESH WIDENING SCOPES FOR ACCESS TO JUSTICE

3.1 Prevalence of ADR mechanisms in Bangladesh

Bangladesh has had a long tradition of community-based alternative dispute resolution (ADR) system, widely known as shalish. Formally, the ADR mechanism was first inserted in the Family Court Ordinance of 1985 encompassing provisions[18] for compromise or reconciliation even before pronouncement of judgment. Subsequently, the great success in realization of dower money and maintenance as well as amicable, peaceful and quick settlement of disputes through ADR in the Family Courts inspired the government and the policy makers as well to widen the scope of ADR through other legislations.[19] Accordingly, for non-family civil suits and cases, [20]the 1908 Code of Civil Procedure got amended in 2003 with provisions of Mediation u/s 89A, Arbitration u/s 89B, Mediation in Appeal u/s-89C in 2006; and the Artha Rin AdalatAin in 2003 with Settlement Conference u/s 21 and Mediation u/s 22.The use of ADR in Artha Rin cases is a success story. Besides, ADR is gradually progressing and becoming a popular forum for the litigants of civil cases. Both the 2006 Village Court Act and the 2004 Conciliation of Dispute (municipal areas) Board Act have incorporated the spirit of the mediation process to deal with both civil and criminal matters. However, the scope to use ADR in the criminal justice system is still very limited.[21]

[18] The Family Court Ordinance,1985 (Pre-trial Proceeding u/s 10 & Post-trial Proceeding u/s 13)
[19] Muslim Family Laws Ordinance, 1961, [Polygamy u/s 6, Divorce u/s 7 and Maintenance u/s 9].
[20] The Labor Code, 2006 [Negotiation u/s 210(1,2,4), Conciliation u/s 210(6) and Arbitration u/s 210(16)]
[21] The Criminal Procedure Code,1898, (Compounding offences u/s 345.)

3.2 Access to Justice & the Constitution of Bangladesh:

Justice is the foundation and object of any civilized society.[22] Access to justice refers to any type of hindrances for the citizens to have a practical and usable way to realize their legal rights. As depicted earlier, rule of law and access to justice are important elements for the stability and development of states. It is argued that governments gain significant legitimacy, both domestically and internationally, when rights are respected and promulgated. Access to justice is a particularly important aspect of the rule of law in the context of development work.[23] In fact, one reason is that access to justice has been a principal objective in many programs of international cooperation. Since 'rule of law provides effective protection and advancement of constitutional rights and entitlements' , securing access to justice in Bangladesh is understood as a constitutional mandate. Bangladesh Constitution holistically guarantees justice to all. All Bangladeshi citizens are guaranteed equal rights of life and personal liberty besides many other fundamental rights. Article 27 of the Constitution ensures equality before law and the equal protection of law. Article 31 ensures that 'to enjoy the protection of law, and to be treated in accordance with law and only in accordance with law is the inalienable right of every citizen.' Article 32 guarantees protection of right to life and personal liberty. Article 44(1) ensures the right to move to the High Court Division under Article 102(1) is itself a fundamental right. All these constitutional provisions are thought to be instrumental avenues for providing all access to justice. In *Mohiuddin Farooque vs. Bangladesh*,[24] the Appellate Division observed [i]f justice is not easily and equally accessible to every citizen, there

[22] Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives, http://tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf Accessed 20 Nov 2018. For more on this premise, see Broadbent Nigel, (2009) Alternative Dispute Resolution, Cambridge journals, Legal information management 9 (2009) the British and Irish Association of Law Liberations, p-195-97.
[23] 8William Davis and Helga Turku, Access to Justice and Alternative Dispute Resolution, Journal of Dispute Resolution. (2011) Available at: https://scholarship.law.missouri.edu/jdr/vol2011/iss1/4; accessed Nov 27, 2023.
[24] 49 DLR (AD) (1997) para-71.

then can hardly be any rule of law. If access to justice is limited to the rich, the more advantaged and more powerful section of the society, then the poor and deprived will have no stake in the rule of law …… Ready and equal access to justice is a sine qua non for the maintenance of rule of law. But ironically, access to justice in Bangladesh is being hampered by many factors. Some of these factors are the high court fees, geographical location, complexity of rules and procedure and the use of legalese. Court's role is also dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves. There is also lack of awareness of ADR mechanisms. These reasons make access to justice in Bangladesh difficult and shadow rather than reality to many people

3.3 Alternative Dispute Resolution and Access to Justice:

Of course, access to justice is a social good that is enhanced through active government participation. As such, by providing access to justice, governments enhance their legitimacy, improve their ability to create social change, and facilitate economic development. Access to justice is much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable. Effective reforms leading to access to justice require an integrated approach that includes alternative dispute resolution mechanisms. This is because ADR mechanisms such as arbitration, mediation and negotiation are predicated on the principles of party autonomy and voluntariness which give the parties wider roles in decision-making and in resolution of their disputes. As such, ADR mechanisms results in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and

voluntariness as well as accountability in dispute management.[25] Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation. Additionally, it fosters relationships, non-coercive and results to mutually satisfying outcomes. These are thus thought to be most appropriate in enhancing access to justice as this way less disputes will get to the courts and this will lead to a reduction of backlog of cases.

3.4 Development & Popularity of ADR in Bangladesh

ADR cannot be the substitute option for adjudication system in general. It has value and importance as compliment to the adjudication system in a country. It is believed here that speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with administration of justice.[26] The Bangladesh Government has taken aforesaid measures to ensure the access to justice for the people through strengthening the ADR mechanism. Now a days, the justice seekers are getting legal support & being able to resolve their disputes through these laws & Legal Aid Offices. In addition, the Ministry of Law has undertaken different measures to motivate and sensitize judges, lawyers and the litigant public about the merits and advantages of the ADR. Workshops, seminars, training programs have been organized for judges, lawyers and court support staff in the divisional headquarters and selective districts. A widely acclaimed documentary film titled "Settlement of Disputes through Mediation" has been made and shown to the participants and the stakeholders all over the country. ADR system is gaining popularity. This procedure will help to reduce the huge

[25] For more see Hasan, Mr. Justice K.M. (2005) Alternative Dispute Resolution, Bangladesh Institute of law and International Affairs (BILIA) (edited). Wali-ur- Rahman and Mohammad Shahabuddin, at 125-27.

[26] J ustice S.B. Sinha, ADR and Access to Justice: Issues and Perspectives, http://tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf Accessed 20 Nov 2023

backlogs of civil cases as well as criminal cases in courts. Public confidence in the judiciary will thereby increase. Access to justice will be expanded. It is argued that access to justice systems refers to the creation of paths to resolve conflicts that are within the purview of the formal legal structure by using differentiated strategies such as mediation, early neutral evaluation, arbitration, and the many combinations of other methodologies all designed to promote early swift resolution of conflicts.

3.5 Mediation

It is difficult to present a single board and comprehensive defecation of mediation process because of the extensive variety of different way in which the Mediation process can take place. Mediation is a voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a mutually acceptable settlement. Unlike judge or arbitrator, the mediator has no power to impose a solution on the disputant; instead the mediator assists them in shaping solution to meet their interests.[27]

According to Section 89A of the Code of Civil Procedure, 1908. Except in a suit under Artha Rin Adalat Ain, 1990(Act of 4 of 1990), after filing of written statement, if all the contesting parties are in attendance in the court in person or by their respective pleaders, the court may, by adjourning the hearing mediate in order to settle the dispute of disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or to the party or disputes in the suit to the engaged pleaders of the parties, or to the party or parties, where no pleaders have been engaged, or to a mediator from the panel as me be prepared by the district judge under sub-section (10), for under taking efforts for settlement through mediation.[28]

[27] Ibid. p. 39
[28]Ibid. p. 105

3.6 Negotiation

Negotiation is the most common form of dispute resolution Negotiation is face to face discussion between the parties with a view to reaching an amicable settlement. It is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Compared with process involving third parties, generally negotiation allows the disputant themselves to control the process and the solution. In other word, negotiation system creates a structure to encourage and facilitate direct settlement between parties to a dispute, without the intervention of a third party. The disputing parties may be represented by attorneys in negotiation

Negotiation is different from mediation in that there is no neutral third party or individual to assist the parties to negotiate. However sometime a third party involves a negotiation and when third parties is involved, he usually breaks the ice and bring the parties to the negotiation table and that withdraws from the negotiation process. This feature also makes it different from mediation and arbitration.[29]

3.7 Arbitration

Arbitration is an adjudicatory dispute resolution process in which one or more arbitrators issues a judgment on the merits (which may be binding or non-binding) after an expedited adversarial hearing, in which each party has the opportunity to present proofs and arguments In other words, arbitration is a private process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision.

Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties. Arbitration is different from

[29] Md. Abdul Halim, ADR in Bangladesh: Issues and Challenges, 2nd ed. (CCB Foundation: Dhaka, 2011). p. 38

mediation because the neutral arbitrator has the authority to make a decision about the dispute. The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator. Compared to traditional trials, arbitration can usually be completed more quickly and is less formal. For example, often the parties do not have to follow state or federal rules of evidence and, in some cases, the arbitrator is hot required to apply the governing law. After the hearing the arbitrator issues an award Some awards simply announce the decision and others give reasons. The arbitration process may be either binding of non-binding. When arbitration is binding, the decisions final, can be enforced by a court, and can only be appealed on very narrow grounds When arbitration is non-binding, the arbitrator's award is advisory and can be final only if accepted by the parties.[30]

3.8 Practice of ADR in Non-Governmental Organization

In our country some NGO are established and getting popular for the alternative approach to settle local dispute between most of being distress people in the society. Basically they arranged mediation and local Shalish to the poor people and especially women who does not able to access in the formal justice way. It is heartening to note that many non-government organizations (NGO) are coming forward to extend help to women in such condition so that they can be self-sufficient.[31] Non Government Organizations (NGO) is reducing the burden of Court and people harassments. The rate of successes of disputing matters settled by mediation process under NGOs is holding satisfactory level. Most of the NGO achievements are remarkable, some of are mentioned below:

[30] Ibid,p 42

[31] K M Hasan, *ibid.,* p. 15.

3.8.1 Madaripur Legal Aid Association

The Madaripur Legal Association (MLAA) was founded in 1978 by a group of social scientists, human rights NGO activists and like minded legal professionals, So the speak that MLAA was the first organization to identify ADR as an important foundation for a cost effective, expedious, and accessible venue of justice for the disadvantaged. It's goal is to contribute in establishing a sustainable society of justice and equal rights.[32]

3.8.2 Ain O Shalish Kendro:

Ain O Shalish Kendro (ASK) a law arbitration center established in 1986. This organization is working for promoting community activism for gender, social justice and human rights in the society. Women of the different professions of garment workers, house workers and sexual activists are getting benefited from this organization. This organization through mediation solves the disputes and makes a consensual paper.[33]

4.3.3 Bangladesh Legal Aid and Services Trust:

A largest legal aid and cooperating organization in Bangladesh play an important role to ensure assistance to the disadvantage people. It does not provide a legal aid in litigation but arranged mediation by the consensual consent of the disputing parties. IT is founded in 1993 and incorporated with the Registration of Joint Stock Companies as a company limited by guaranty. It was also registered as anon government organizations (NGO with the NOG Affairs Bureau of the Government of Bangladesh in 1993).[34]

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[32] Ansar Ali Khan, *ibid.*, p. 156.

[33] [http://www.askbd.org/web/index.php?page_id=420, access date 28 November, 2023]

[34] Ansar Ali Khan., *ibid*, p. 150.

Chapter 4

EXPLANATION CONCEPTS OF ALTERNATIVE DISPUTE RESOLUTION ADR

4.1 Purposes of Alternative Dispute Resolution (ADR)

The ADR Practitioner Guide spells out how ADR can serve different objectives. It explains that ADR system may be designed to meet a wide verity of deferent goals. Some of these pools are directly related to improving the administration of justice and rule of Law. Some however are related to other development objectives, such as economics restructuring, or the management of tensions and conflict in communities. Efficient dispute resolution procedure may be critical to economic development objective where court delays or corruptions inhibit foreign investment and economics restructuring.[35] Legal procedures are process of dispute resolution that takes place in the courts of law. Basically, people go in the legal authority to obtain a favorable verdict but also to have a feeling of victory over the other which may in the minds of the victors exceed the metal gains made out of the resolution of the problem or dispute. It is a win-lose game. This process often holds disputes, and leaves permanent scars; on the mind of the losing party rather than resolving the problem, and it may end in making the disputes endemic and long lasting. When the losing party gets a chance, they look for revenge.

4.2 Purpose of ADR in the context of Rule of Law

Within the context of rule of Law initiative, ADR programs can be:

i. Support and complement court reform;
ii. Bypass ineffective and discredited court system and procedure;
iii. Increase popular satisfaction with dispute resolution;
iv. Increase access to justice for disadvantaged groups;

[35] Md. Abdul Halim, ADR in Bangladesh: Issues and Challenge. 2ed. (CCB Foundation: Dhaka, 2011)

v. Reduce delay in the resolution of dispute

vi. vi. Reduce the cost of resolving dispute

To this effect the decision of Indian Supreme Court quoted by Justice Mahamudul Amin would be unswerving. "Every citizen of this country has a right to receive speedy inexpensive and unpolluted justice. He is waiting with expectation. Let us response positively. The menace of mounting arrears of court cases cannot be eradicated without the full and unstinted cooperation of the members of the Bar and presiding Judges Human hope has its Times and waiting endlessly is not possible in the current lifestyle. We the member of judicial fraternity, have therefore to meet the challenge. It can be done by bring passionately driven to serve the cause of justice"[36]

4.3 Classification of Alternative Dispute Resolution (ADR)

ADR usually encompasses some common modes of mechanisms negotiation conciliation mediation and arbitration. However, the variety of ADR models found in different countries may be described in the following ways:[37]

A Freestanding or court-annexed ADR

ADR may be either is freestanding or court annexed. In other words ADR may be tied to low suitor freestanding.

Court Annexed ADR

When the process of ADR is connected to the law suit or court case it is called court annexed ADR. After filing the court case a judge or court employee will examine the dispute and suggest or order. As a matter of course, the parties to

[36] Ibid,p 63-64

[37] Abdul Halim, A in Bangladesh-Cond Challenged,2nd ed.(CCB Foundation, 2011)p,32

attempt to resolve their differences through alternative dispute resolution in the forms of mediation, conciliation negotiation etc.

Freestanding ADR

Freestanding ADR has no relationship with court cases. When disputants sit for amicable settlement by conciliation on their own, or approach a middle man or neutral third person to negotiate or mediate their dispute, this is freestanding ADR. Instances of freestanding ADR are (1) commercial arbitration (2) local or community based ADR.[38]

B. Biding or Non-binding ADR

It is important to distinguish between binding and non-binding forms of ADR. Negotiation mediation and conciliation are non-binding and depend on the willingness of parties to reach a voluntary agreement. Arbitration programs may be either binding or non binding. Binding arbitration produces a third party decision that disputant must follow even if they disagree with the result much like a judicial decision. Non-binding arbitration produces a third party decision that the parties may reject. Again, there is another aspect of mandatory and voluntary character of ADR and this is with regard to how disputes enter ADR process. In other words, resorting to ADR system may either be mandatory or voluntary. If the parties are compelled to use ADR (by the Court or statute for example) them the use is binding or mandatory.[39]

C. Formal and informal ADR

Compared to formal legal process in the court cases, ADR process is less formal. It is often emphasized that ADR is informal process to dispute resolution compared to formal legal system. ADR process is formal in the sense that rules of procedure are flexible without formal pleadings, extensive written documentation,

[38] Ibid, p.32
[39] Ibid, p.34

or rules of evidence etc. Now these formal ADR modes are divided into two groups Formal ADR groups and informal ADR groups.

When a particular ADR is court annexed, it tends to be more formal in the sense that its records and proceedings may be required to be presented before the court. On the other hand when a particular mode of ADR is freestanding, it tends to be informal in the sense that the parties and the mediator do not need to keep any record of their proceeding.[40]

D. Basie and Hybrid ADR process

The Varity of ADR models found in developed and developing countries may also be classified in two fundamental ways: Basic ADR processes, which include Negotiation, conciliation, mediation, and arbitration and HYBRID ADR processes in which specific elements of the basic processes have been combined to create a wide variety of ADR methods. For examples, the mini-trial mixes an adjudication-like presentation of arguments and proofs with negotiation.[41]

4.4 Modes of Alternative Dispute Resolution

Different modes of alternative processes are practicing in our country and worldwide.

4.4.1 Negotiation

Negotiation is the most common form of dispute resolution Negotiation is face to face discussion between the parties with a view to reaching an amicable settlement. It is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Compared with process involving third parties, generally negotiation allows the disputant themselves to control the process and the solution. In other word, negotiation system creates a structure to encourage and facilitate direct settlement between parties to a dispute,

[40] Ibid, p.36
[41] Ibid. p. 37

without the intervention of a third party. The disputing parties may be represented by attorneys in negotiation

Negotiation is different from mediation in that there is no neutral third party or individual to assist the parties to negotiate. However sometime a third party involves a negotiation and when third parties is involved, he usually breaks the ice and bring the parties to the negotiation table and that withdraws from the negotiation process. This feature also makes it different from mediation and arbitration.[42]

4.4.2 Conciliation

Conciliation is a type of mediation whereby the disputing parties use a neutral third party (a conciliator) who meets with the parties separately in an attempt to resolve their differences. Conciliation differs from mediation in that the main goal is to con most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties' needs, takes feelings into account and reframes representations. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator, instead a conciliator meets with the parties separately "caucusing". Such form of conciliation (mediation) that relies on exclusively on caucusing is called "shuttle diplomacy". Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Mediation and conciliation systems are very similar in that they interject third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not

[42] Md. Abdul Halim, ADR in Bangladesh: Issues and Challenges, 2nd ed. (CCB Foundation: Dhaka, 2011). p. 38

have the authority to decide or rule on settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.[43]

4.5 ADR in Civil Procedure of Code

Taking into account of the success and achievement of the mediation in the Pilot Family Court project initiated in 2000-2001, the government the day was committed to bring necessary changes into the Code of Civil Procedure so that alternative dispute resolution mechanism may be introduced into the field of general civil litigation. The Code of Civil Procedure (Amendment) Act, 2003 (Act No. IV of 2003) was enacted on the 271h February, 2003 and given effect to from the 1st July, 2003. This Act substituted Part of the Code with a new chapter titled "Alternative Dispute Resolution with three new sections. The part is reproduced below:

4.5.1 Special Proceeding of ADR

89A. Mediation- Except in a suit under Artha Rin Adalar Ain, 1990 Act of 4 of 1990), after filing of written statement, if all the contesting parties are in attendance in the court in person or by their respective pleaders, the court may, by adjoining the hearing mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or to the party or disputes in the suit to the engaged pleaders of the parties, or to the party or parties, where no pleaders have been engaged, or to a mediator from the panel as me be prepared by the district judge under sub-section (10), for under taking efforts for settlement through mediation.

89B. Arbitration (1) If the parties to a suit, at any stage of the proceeding, apply to the Court for withdrawal of the suit on ground that they will refer the dispute or

[43] Ibid. p. 41

disputes in the suit to arbitration for settlement, the Court shall allow the application and permit the suit to be withdrawn; and the dispute or disputes, thereafter, shall be settled in accordance with Salish Ain, 2001 (Act No. 1 of 2001) so far as may be applicable.[44]

Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution. Mediation is a process close in its premises to negotiation: "mediation is an assisted and facilitated negotiation carried out by a third party" (Goldberg at al., 1992). The mediators, who are hired, appointed, or volunteer to help in managing the process, should have no direct interest in the conflict and its outcome, and no power to render a decision.

They have control over the process, but not over its outcome. Power is Vested who have control over the outcomes they are the architects of the solution.

The mediator's role is multiple:

- to help the parties think in new and innovative ways
- avoid the pitfalls of adopting rigid positions interested
- to avoid the pitfalls of adopting rigid positions instead of looking after their to smooth discussions when there is animosity between the parties that readers the discussions futile, and in general to steer the process away from negative outcomes and possible breakdown towards joint gains.

Mediation has become a very important and viable alternative to adjudication and arbitration in the legal system (labor disputes, family, business, and commercial disputes). In some countries and states we find laws of mandatory mediation, as a way to encourage the parties to the dispute to use the mediation process as a preferred way to resolve disputes.

[44] Ibid, p.95

Unlike the process of facilitation, where the third party merely hosts the parties and encourages them to continue negotiating in a neutral, welcoming environment, the mediator plays a more active role. The mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests. and reach a resolution agreed by all concerned.

A mediator should study the substance of the dispute, and try to identify the issues in conflict using tools such as re-framing active listening, open-ended questions, and his/her analytical skills. Mediation is a voluntary process (except where there is a law of mandatory mediation in place). The parties agree to the process, the content is presented through the mediation, and the parties control the resolution of the dispute. Because the participation of the parties and the mediator is voluntary, the parties and/or the mediator have the freedom to leave the process at any time. The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary, the parties own it and are responsible for implementing it. The agreement is validated and ratified by the courts.

4.6. Stages of Mediation

Mediation commonly includes the following aspects or stages.[45]

- A controversy, dispute or difference of positions between people, or a need for decision making or problem-solving.
- decision-making remaining in the parties rather than being made by the neutral:

[45] http://www.worldbank.org/publicsector/legal/adr.html

- The willingness of the parties to negotiate a positive solution to their problem and to accept a discussion about respective interests and objectives:
- The intent to achieve a positive result through the facilitative help of an independent and neutral third person. The typical mediation has no formal compulsory elements, although some common elements are usually found:
- Each party having a chance to tell his or her story:
- Identification of issues, usually by the mediator;
- The clarification and detailed specification of the respective interests and objectives,
- The conversion of respective subjective evaluations into more objective values,
- Identification of options:
- Discussion and analysis of the possible effects of various solutions,
- The adjustment and the refining of the accessory aspects.
- Memorializing the agreements into a written draft Due to the particular character of this activity, each mediator uses a method of his or her own (a mediator's methods are not ordinarily governed by law) that might eventually be very different from the above scheme. Also, many matters do not legally require a particular form for the final agreement, while others expressly require a precisely determined form.

4.6.1 The Role of Mediator

The mediator should consider the following to be part of her /his task :

- Help to coordinate the meetings
- Introduce the parties.
- Explain the process in the parties

- Set the agenda and rules
- Create a cease-fire between the parties.
- Open communication channels
- Gain the confidence and trust of the parties
- Gather information and identify obstacles
- Allow the parties to express feelings and vent emotions
- Help the parties to identify and understand their interests and priorities
- Help the parties with brainstorming creative options and solutions
- Help in defining acceptable objective criteria
- Help the parties understand the limitations of their demands through what is known as " a reality test."
- Help in evaluating alternatives
- Allow the process to move forward according to the needs and pace of the parties
- Help in crafting the agreement.

Help in validating the agreement by the courts (if there is a court that has jurisdiction)

4.6.2 Controversial Issues of Mediation

The field continues to struggle with many controversial issues, including:

- The evaluative mediator versus the transformative mediator.
- The issue of private caucus" should we have private caucus, or use only joint meetings with the parties?
- Is there a need for a mediator with special expertise in specific subject matters banking, land, water, building industry, computers, and so on)?

- Should criminal cases and domestic violence be mediated? What mediation is all about and how it should be handled are topics of contention and disagreements in the mediation community.

Dwight Golann (1996) addresses the issue of the purpose of mediation, and proposes that the primary function of the mediator is to resolve disputes, not to empower and transform the parties. Golann is not against empowerment and transformation of the disputants, but feels that the parties who are in court, or are about to go that route, concern themselves with the need of settling the dispute, not with transformation Professor L. Riskin (1996) looked mediation from two systems on a continuum and created a grid, which illustrates the wide variety of problems, goals, techniques, and strategies that a mediator can employ in order to resolve a dispute.[46]

[46] Md. Akhtaruzzaman. Concept and laws on Alternate Dispute Resolution and Legal Aid,7 th ed. (Razia khatun,2018)

Chapter 5

ALTERNATIVE DISPUTE RESOLUTION (ADR) UNDER STATUTORY LAW

The different ways have been applying alternatively in our country to reduce pres from the Court which is inserted in different statute laws. Most of them are described in below:

5.1 ADR under the Code of Civil Procedure, 1908

Taking into account of the success and achievement of the mediation in the Pilot Family Court project initiated in 2000-2001, the government the day was committed to bring necessary changes into the Code of Civil Procedure so that alternative dispute resolution mechanism may be introduced into the field of general civil litigation. The Code of Civil Procedure (Amendment) Act, 2003 (Act No. IV of 2003) was enacted on the 17 February, 2003 and given effect to from the 1st July, 2003. This Act substituted Part of the Code with a new chapter titled "Alternative Dispute Resolution with three new sections he part is reproduced below.[47]

5.2 ADR under Family Ordinance, 1985

Family Law Ordinance, 1961, the Family Courts Ordinance, 1985 has built-in As opposed to non-judicial mediation through Arbitration Council introduced by Muslim conciliation mechanism in the form of judicial or court-annexed meditation. Two types of mediation mechanism are envisaged in the Ordinance at the instance of sitting judge of the family court:

- Pre-trial Reconciliation proceeding under section 10; and

[47] Md. Abdul Halim, ADR in Bangladesh issues and Challenges and 2nd ed. (CCB Foundation: Dhak, 2011), p. 95

- Post-trial Reconciliation proceeding under section 13.[48]

There has also been provision in section 11 of the Ordinance with regard to holding ceding in camera, if needed. The purpose of these provisions is to any part of the proceeding in camera, if needed. The purpose provide a mechanism enabling disputant parties to resolve the outstanding issues into discreetly and with a sense of accommodation in which the Family Courts will play the role of a well-wisher and friends rather than an adjudicator However the last two decades experience since the enactment of this legislation suggests that the desired specialization in disposing of family matters and the practice of mediation or conciliation during family court proceedings are waiting and the atmosphere or tradition of it is virtually nonexistent. One commentator found that this compromise procedure of the Family Court is only extending the life of the suit and is an extra burden to the Family Courts where a large number of case are awaiting disposal. [49]

5.3 Arbitration Act, 2001

- Provided no order has been given for settling the dispute through Settlement Conference according to Section 21. after submission of written Statement by the defendant, keeping pending all subsequent proceeding subject to the provisions of Section 24, the Court may refer the case to the engaged lawyers or may send the dispute to the parties for settlement it no lawyers have been engaged.

[48] Md. Abdul Halim, ADR in Bangladesh issues and Challenges and 2nd ed. (CCB Foundation: Dhak, 2011), p. 13

[49] Ibid, p.137

Provided that if the parties submit petition to the Court ore that they are creed to the case through arbitration, it shall be compulsory for the Court to send the case for settling through arbitrating efforts.

- The case as referred according to sub-section the lawyers aged for conducting the case, on mutual consolation with the parties to the suit may engage a lawyer on mutual consultation who is engaged by neither of the parties or may engage any retired Judge or a retired office of a bank or f financial institution or any other competent personas arbitrator in the interest of selling the dispute

Provided that person employed in any beneficial part of the Republic is barred to be appointed as arbitrator under this Section

- The court shall not specify any procedure for settlement or fix any remuneration for the lawyers and when disposing any suit thorough arbitration, the lawyers, the parties and the arbitrator shall finalize the system of settlement and the fee of the arbitrator and the lawyers on the basis of mutual discussion.
- The date on which, the Court shall give order, such order for settling the matter through arbitration, the arbitration process shall have to be completed within 60 days passing order for settling the issue through arbitration process until the Court extend time for further 30 days on persuasion by the parties or its own initiatives showing cause there of :

Provided that under sub-section (1) the parties shall communicated Court in writing within 10 days of arbitration order whether they have been agreed to take step for settling the dispute through arbitration who has been engaged for settling dispute.[50]

[50] Ministry of Law and Justice Government of the People's Republic of Bangladesh Code of Civil Procedure,1908

Provided further that, if the parties fail to communicate vie Court within 10 days of passing the order as per provision of sub-section- (i) said order shall be canceled and the hearing and subsequent process of the suit shall immediately be started in such manner as it no order was given for settling the matter through arbitration under the provision of sub section (i).

- The arbitrator shall submit a report to the Court on his arbitration activities without leaking out the secrecy of the parties.
- If the disputing issues of the suit have been settled through arbitration, the terms and conditions of the agreement so settled, shall have to be incorporated in the aforesaid report and the parties and the lawyers shall sign or put left of thump impression as may be applicable over the agreement as executors and the lawyers as witness.[51]

5.4 Arthorin Adalat Ain, 2003

Anthorin Adalat Ain disputes concerned with loan money is settled through two processes, one is Settlement conference and another is Arbitration. These alternative mechanisms are conducted by concern court, so these are also called judicial ADR as to the Joint Dist. Judge Md. Akhtaruzzaman. The Judge of Artho Rin Adalat presides over the Settlement Conference and conducted functions. If no settlement by Settlement Conference the court may refer the case for arbitration. The Chief justice Mostofa Kamal on the Artho Rin Adalat about ADR says that, "The realization is 10 times higher than the realization by execution cases over the last 10 years.[52]

[51] Ibid,p.168
[52] Ibid,p.168

5.5 ADR under the Bangladesh Shomromo Ain, 2006

The first legislation where the concept of ADR in the form of negotiation and conciliation has been effectively introduced and recognized by law is in the field of labour law, namely, Industrial Relations Ordinance, 1969 which is now replaced by the Shomoromo Ain, 2006. This Code being both social and legal legislation envisages two different approaches to dispute resolution:

(1) pure legalistic approach to individual employment dispute and
(2) Socio-legalistic approach to industrial dispute[53].

5.6 ADR under the Muslim Family Laws ordinance, 1961

Muslim Family Ordinance 1961 and the Family Courts Ordinance, venues for reconciliation or alternative dispute resolution . The Mummy LAW Ordinance, 1961 provides mechanism for reconciliation through the Arbitration Council and this type of reconciliation is not a part of judicial ADR; administrative in nature which will be discussed later on in this chapter On the other hand, the Family Courts Ordinance, 1985 provides for mechanism for reconciliation through judges as necessary part of judicial proceeding (court annexed ADR).[54]

ADR under the Muslim Family Laws Ordinance, 1961. Under this law provision for conciliation or alternative dispute resolution through arbitration council has been provided for in three circumstances

(1) In case of polygamy under section 6,
(2) In case of giving talaq and making it effective under section 7 und
(3) In case of failure of the husband to provide maintenance of his wife under section 9.

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[53] Abdul Halim. ADR in Bangladesh issues and Challenges 2nd ed. (CCB Foundation. Dhaka,2011 p. 119)

[54] Abdul Halim. ADR in Bangladesh issues and Challenges 2nd ed. (CCB Foundation. Dhaka,2011 p. 125)

Arbitration Council: Section 2(a) of the Muslim Family Laws Ordinance, 1961 defines that arbitration council means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with this ordinance.[55]

5.7 ADR under The village court Act, 2006

Given the appalling conditions of pending cases in both the lower and higher judiciary and at the same time enormous pressure and workload in the formal justice system in Bangladesh revamping the informal or quasi-formal justice dispensation system at both rural and urban area has been one of the recent mottos of the government of Bangladesh. With that end in view the Ministry of Local Government Division (LGD). UNDP and the European Commission jointly have undertaken a programmed in 2009 titled Activating Village Courts in Bangladesh' to providing support to the justice system through this project in 500 selected Union Parish ads (UP) of the country. It also intends to develop capacity of the village court members, elected representatives and on the role and functions of village courts and their benefits on the overall justice system.[56]

However the last two decades last two decades' experience since the enactment of this legislation suggests that the desired specialization in disposing red specialization in disposing of family matters and the practice mediation or conciliation on or conciliation during family court proceedings are waiting and the atmosphere or tradition of it is virtually nonexistent2. One commentator found e procedure of the Family Court is only extending the life of the suit and extra burden to the Family Courts where a large number of case are awaiting disposal.

[55] Ibid

[56] Md. Akhtaruzzaman. Concept and laws on Alternate Dispute Resolution and Legal Aid,7 th ed. (Razia khatun,2018)p. 108

5.8 *Dispute Conciliation (Municipal Area) Board Act, 2004*

This Act has emerged to expedite the settlement of disputes which has been inserted in schedule of this Act for Municipal areas. There have a dispute conciliation board consists of five members including the chairman of paurosoba and two members from the plaintiff side and tow members from the defendant side. Provided that one of the members will nominated by the each party shall be a commissioner of paurosoba.[57]

The procedure of institution of a suit to the board is very flexible and having short span. The concern person of writing in bangla on white paper and shall duty signed or thumb impression, may file an application to the board. After filling application shall be examined by the paureosaba officer assigned by the board shall be registered in to the specify register. If found that the case is not tribal by the board, then will return that application having mentioned the cause for that.

In any case relating to a matter specified in part 2 of the schedule. The board shall power to pay compensation or payment of money or to order restitution of property disposed.[58] No question should be allowed to rise in any Court or to institute any fresh suit in the higher court against the order was made by this board under this Act. Recovery of the payment of compensation and the decreed amount is an effective system of this alternative mechanism. The board shall forward the same to the paurosoba to recover the amount in the same manner as a tax levied by the paurosoba.

One of the cardinal natures of this alternative mechanism is that no lawyer should be appointed. Parties are eligible to proceed themselves.[59]

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57 Md. Aktaruzzaman, *ibid.,* p. 199.

58 *Ibid.,* p. 200.

59 *Dispute Conciliation (Municipal Area) Board Act*, 2004, s. 17.

Chapter 6

RECOMMENDATIONS AND CONCLUSION

6.1 Recommendation:

It is pertinent to say that day by day our law and legal system has being changed and we have inserted with adaptation laws and principles by enacted and amended the statute. So we should find out the barriers or pitfalls and have to work towards the solutions. We should have taken some effective measures for the expansion of ADR. It is more important is that the implementation of the recommendations. Herein below given some recommendations which may help for changing our legal system and justice; The Recommendations of my thesis paper and as follows:

- To make people more conscious about rules and restriction for engaging ADR System justices.
- By training the advocate about the consequence mechanisms of ADR
- To award the particle of civil litigation about ADR.
- To show and infant advantage of ADR in the Society.
- To ensure the practice of ADR in village court and also in social salish system.
- The adequate training of concerned judges, lawyers and the court staffs must be ensured with practical experiences so that they can overcome when get problem.
- We must create awareness about ADR mechanisms and pick up the advantages of it.
- Introducing with the successful and practical oriented ADR systems of other developed countries which have been flourishing to apply those.

- Involving more effectively the Bar Associations and local NGOs with ADR systems.
- The area of application of ADR should be expanded to the criminal procedural laws as well as criminal substantive laws.
- A council or committee for monitoring and promoting the ADR methods of justice in the society.
- Monitoring and case-flow tracking in such a way as to know the status of each case, to know its procedural position, to locate documents and records more easily and to reflect everything in transparency plate.

6.2 Conclusion

Bangladeshi courts are severely overloaded with numerous unresolved cases. The trial period is abnormally lengthy, and the associated costs are very substantial. Prolonged delays in the resolution of trials and appeals raise serious concerns for socioeconomic phenomena as well as the state. Promoting ADR would therefore probably help to lower the appallingly high number of pending cases, as it has done so successfully in other nations. ADR-mediated litigation settlements would be significant tools for advancing social cohesion and peace, improving the standard of social justice, and ultimately supporting significant advancements in the social, cultural, and economic domains, among others. Without further ado, our nation should establish an Alternative Dispute Resolution (ADR) system. This is crucial because ADR can significantly aid in bringing about changes that will improve access to justice and enable people to receive it more quickly. To guarantee and improve access to justice, laws, rules, policies, and legal frameworks pertaining to the efficient application of ADR mechanisms should be carefully crafted, developed, and established. To prevent conflicts, they ought to have strong ties to the legal system.

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